Hardesty Company, Inc. d/b/a Mid-Continent Concrete *and* Teamsters Local Union 373, AFL–CIO. Case 26–CA–17571

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 29, 1998, Administrative Law Judge D. Randall Frye issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to supply information regarding the wage rate of mechanic Mark Bell and refusing to allow the Union to review an applicant list for the position of truckdriver.

It is well established that an employer must provide an incumbent union with requested information, which is necessary and relevant to the performance of its role as collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). *Acme* endorsed the "discovery type standard" applied by the Board. *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1951). The Board has held that an employer has a statutory duty to furnish a union with information concerning suspected discriminatory hiring practices for bargaining unit positions. See *Star Tribune*, 295 NLRB 543, 549 (1989*)*. See also *Bendix Corp.,* 242 NLRB 62, 63 (1979); *White Farm Equipment Co.,* 242 NLRB 1373, 1374–1375 (1979), enfd. sub nom. *Electrical Workers v. NLRB*, 650 F.2d 334 (D.C. Cir. 1980).

We affirm the judge's finding that the Respondent violated Section 8(a) (5) by refusing to furnish the list of applicants for the driver positions. Applicant and union member Jerry Hixson applied for a position as a truckdriver, but was not hired. Three other applicants were hired contemporaneously, none of whom had ostensibly superior qualifications. The Union wrote a letter to the Respondent on August 28, 1996, requesting to review the list of applicants, asserting that Hixson was being discriminated against at least in part because of union activity. Specifically, the letter stated, inter alia, that "Brother Hixson is over 40 years of age and was wearing a Teamster cap when he filled out the application. We feel these are the reasons he was not considered for one of the three positions that have been filled." The Respondent did not reply to the request.

The Respondent contends that the allegation that it failed to provide the applicant list is moot because a separate allegation that the Respondent discriminatorily failed to hire Hixson was withdrawn at hearing. We find no merit in the Respondent's mootness argument. Although the motivation for the Union's information request, at least in part, was concern over discriminatory hiring practices, the issue is not whether the Respondent unlawfully refused to hire Hixson, but the right of the Union to obtain, pursuant to the Board's discovery-type standard, information about the hiring policy in order for it to fulfill its statutory duty to fairly represent employees. Cf. *Markle Mfg.*, 239 NLRB 1142, 1145 (1979), enfd. as modified 623 F.2d 1122 (D.C. Cir. 1980). See also *NLRB v. Arkansas Rice Growers Assn*., 400 F.2d 565, 567–568 (8th Cir. 1968) (union's ultimate abandonment of its underlying dispute does not negate its relevance at the time the information was requested).

The Respondent further contends that the judge's finding is at odds with the holding of the U.S. Court of Appeals for the Third Circuit in *Hertz Corp. v. NLRB*, 105 F.3d 868 (1996). We disagree. Under that court's test, the union must present facts sufficient to support a reasonable suspicion that the employer has discriminated. *Hertz v. NLRB*, 105 F.3d 868. In this case, the Union informed the Respondent of the factual basis underlying its suspicion: i.e., that Hixson wore a union cap; he was not hired; and the Union suspected this was the reason he was not hired. Thus, even under the Third Circuit's test, the Respondent violated the Act.

We also affirm the judge's finding that the Respondent violated Section 8(a)(5) by refusing to furnish the wage rate of employee Mark Bell. On September 16, 1996, during regular business hours, the Union sent a request for this data by facsimile (fax) machine to Respondent's attorney, Steven Andrew. The Union's fax machine, in turn, generated a confirmation report indicating receipt of

[1] The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), and with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

the transmission by Andrew's machine that day.[3] The Respondent contends that it never received the fax and that, in any event, it was not obligated to furnish the information inasmuch as Bell, who had recently been transferred to a nonunit position, is not in the bargaining unit.

Unit employees wage rates are presumptively relevant[4] and Bell had been a member of the unit at the time relevant to the request. As such, the Respondent was obligated to furnish the Union with Bell's pay rate. On the record here, we believe the judge was correct to impute knowledge of the Union's request to the Respondent. The Board has "recognize[d] the facsimile machine as an effective and generally reliable means of communication." *B&C Contracting Co.,* 334 NLRB 218, 219 (2001). See *Clow Water Systems*, 317 NLRB 126 (1995), enf. denied 92 F.3d 441 (6th Cir. 1996). The Union's fax confirmation report, introduced into evidence, was sufficient to create a presumption that Andrew received the fax. *B&C Contracting Co*., supra. The Respondent has not successfully rebutted the presumption. Although, in his capacity as counsel for the Respondent, Andrew has denied receipt of the Union's request, he did not testify at trial. Nor did the Respondent introduce other evidence tending to establish that, despite the confirmation report, the fax was not received by Andrew. Under the circumstances, we do not believe the General Counsel was required to prove the Respondent's actual knowledge of the Union's request. Accord: *Electrical Workers Local 98 (Telephone Man),* 327 NLRB 593 (1999).

2. We agree with the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing bargaining unit employees' health insurance benefits. An employer's unilateral change in a mandatory subject of bargaining during collective-bargaining negotiations violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1961). *Bottom Line Enterprises*, 302 NLRB 373 (1991). Contrary to the Respondent's assertions, it is immaterial that its changes to the plan, a mandatory subject of bargaining, were companywide and as such involved both unit and nonunit employees. See *CompuNet Communications,* 315 NLRB 216, 222 (1994); and *United Hospital Medical Center*, 317 NLRB 1279, 1281–1283 (1995). The Respondent unilaterally implemented a new health insurance plan that resulted in a change of benefits. The new plan required the employees to pay higher premiums and changed coverage. Thus, the Respondent violated Section 8(a)(5) of the Act. Furthermore, there is no merit to the claim that the Union agreed to the new health plan, as the Respondent presented no evidence to support this contention.

We affirm the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing the wage rate of Mark Bell and James Flippen. As the General Counsel notes in his cross-exception, the judge failed to set forth the following underlying facts to support his finding: The Respondent hired Mark Bell as a mechanic on May 2, 1996, at $11 an hour, 25 cents higher than the existing rate for that position. On April 29, 1996, the Respondent also raised front-end loader James Flippen's wage rate to $9.80 an hour, 80 cents higher than the previous highest rate for front-end loaders. The parties did not bargain over these changes.

We also find no merit in the Respondent's contention that the complaint fails to allege the unilateral wage changes as 8(a)(5) violations. During the hearing the General Counsel moved to allege the conduct as an 8(a)(5) violation. The judge said that this was not necessary. He also stated that the General Counsel could brief any allegation that was fully and fairly litigated. The judge found, and we agree, that the wage change allegations have been fully and fairly litigated as 8(a)(5) issues. The judge found the 8(a)(5) violation. Accordingly, we find that the Respondent violated Section 8(a)(5) by unilaterally increasing the wages of Bell and Flippen.

3. The judge found, and we agree, that on or about October 13, 1995, and continuing thereafter, the Respondent engaged in surface bargaining in violation of Section 8(a)(5) of the Act.

Section 8(d) of the Act requires "the employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours and other terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession." Nonetheless, the Act is predicated on the notion that the parties must have a sincere desire to enter into "good faith negotiation with an intent to settle differences and arrive at an agreement." *NLRB v. Wonder State Mfg*. Co., 344 F.2d 210 (8th Cir. 1965). Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." Id. A violation may be found where the employer will only reach an agreement on its own terms and none other. *Pease Co.*, 237 NLRB 1067, 1079 (1978).

In determining whether the Respondent bargained in bad faith, we look to the "totality of the Respondents conduct," both at and away from the bargaining table. Relevant factors include: unreasonable bargaining de-

[3] In describing the confirmation report, the judge inadvertently referred to Andrew as "Anderson."

[4] See *Sea-Jet Trucking Corp.*, 304 NLRB 67 (1991); *W. B. Skinner, Inc*., 283 NLRB 989, 990 (1987).

mands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table. See *Atlanta Hilton & Tower,* 271 NLRB 1600 (1974); *NLRB v. Stanislaus Implement & Hardware Co.,* 226 F.2d 377 (9th Cir. 1955); and *NLRB v. Arkansas Rice Growers Assn*., supra at 572.

From its first proposal forward, the Respondent called for a substantial reduction in extant wages and benefits, particularly economic benefits. Prior to the advent of the Union as the employees' exclusive representative, the employees had received paid overtime after 40 hours, 7 days' vacation, a companywide insurance plan to which the employees made monthly contributions, and a 401(k) and bonus load plans. In addition, employees were entitled to a 1-week vacation after 1 year and 2-week vacation after 2 years. Under the Respondent's initial proposals, the employees would lose paid overtime, resulting in a substantial loss of income.[5] The Respondent also changed the employee's insurance coverage, such that the employees were required to pay higher premiums and received less coverage and proposed the elimination of the 401(k) and bonus load plans.

With respect to its vacation proposal, the Respondent engaged in regressive bargaining. On November 29, 1995, the Respondent proposed a 1-week vacation after 1 year of employment and 2 weeks' vacation after 2 years. Under the proposal that the Respondent advanced on February 5, 1996, however, the employees were required to work a minimum of 1540 hours per year or 38-1/2 (40 hours) weeks before they would be entitled to any vacation time, and they would not receive a second weeks' vacation until they worked 3 years, rather than 2.

Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining. As the Board stated in *John Asquaga's Nuggett*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nom. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992), "refusal[s] to budge from an initial bargaining position, [refusals] to offer explanations for one's bargaining proposals (beyond conclusional statements that that is what a party wants), and [refusals] to make any efforts at compromise in order to reach [a] common ground" can constitute evidence of bad-faith bargaining.

The Respondent failed to provide a legitimate explanation to justify the significant differences between the proposals that it advanced in negotiations and the status quo prior to negotiations. The record shows that, in bargaining, the Respondent did not attempt to justify its economic proposals. Even when it attempted to do so after-the-fact on brief by asserting that Fort Smith/Van Buren facility was Mid-Continent Concrete's least profitable facility, no evidence was presented to support this claim. Belying this contention is the statement by the Respondent's general manager, Bill Lincks, that, had employees not elected the union they would be earning $10 an hour, a wage rate higher than the status quo prior to bargaining. When the Respondent insisted on eliminating paid overtime, a benefit accounting for a significant portion of the employees' wages, its only explanation was its unsubstantiated claim that it was considering this practice on a companywide basis. The Respondent, however, provided no evidence that it considered or implemented a no-overtime policy at any of its other facilities. In contrast, the Respondent also proposed maintaining current wages rates for unit employees despite the contemporaneous grant of wage increases to the Respondent's other nonunion facilities. The Respondent also refused, without explanation, the Union's proposal of accumulating vacation on a pro rata basis, and the Respondent proposed elimination of the 401(k) and bonus load plans.

The Respondent was similarly unwilling to compromise on, or provide explanations for, its noneconomic proposals. The Respondent's management-rights clause would allow the Respondent to assign all unit work to employees outside the unit. The Respondent's explanation was that it wanted the ability to subcontract work, including bargaining unit work when it believed that it would be beneficial to do so. The examples the Respondent gave where the subcontracting clause would be of use concerned nonbargaining unit work (e.g., equipment repair which unit employees were untrained to perform), yet the language of the provision was much broader than what the Respondent claimed was its intended use. Viewing, as did the judge, the "totality of the circumstances," we find that the Respondent's lack of an explanation and justification for these proposals, its intransigence, and its failure to make concessions support a finding that the Respondent intended to avoid reaching an agreement.

Further evidence of bad faith can be found in the orchestrated, almost staged, manner of the negotiation. Unexplained concessions can be considered a tool to disguise and conceal a party's strategy of surface bargaining. *NLRB v Herman Sausage Co*., 275 F.2d 229 (5th Cir. 1960). The Respondent's negotiating style was to put forward a harsh bargaining proposal, stand by the proposal, then as the negotiations dragged on, concede

[5] According to employee Chris Poole, the employees averaged 10 hours a week of paid overtime. In his case, he averaged $135 a week in overtime based on his $9-hour wage rate.

no more than the status quo, and stall the negotiations by refusing or delaying its response to any additional proposals. Negotiations were held approximately once a month, and the negotiating sessions did not increase in frequency even as the parties' differences narrowed. The Respondent put forward several unsubstantiated proposals, and then later retreated from them, with no explanation. Additionally, as the negotiations progressed, the Respondent, in a uniform manner, appeared to slow down and drag out the negotiations. An example is its vacation proposals. Prior to February 12 the parties had agreed to a number of noneconomic proposals. On February 12, roughly 6 months into the negotiations, the Respondent submitted a regressive vacation proposal. The Respondent withdrew a proposal that would have left vacation at the status quo and substituted a proposal that included a provision that entitled the employees to 2 weeks' vacation only after 3 years' employment. No reason was advanced for why the Respondent altered its proposal. Later, the Respondent made a concession in giving up its demand for 2 weeks' vacation only after 3 years. There was no indication that Respondent's concession was in exchange for anything. Backing off on part of the proposal enabled the Respondent to claim it had made concessions while still allowing the Respondent to stall the negotiations. The Respondent also compromised on the elimination of the 401(k) and bonus load plan for no apparent reason (i.e., there was no tradeoff). By April, the Respondent's chief negotiator indicated that, although it had new proposals, it was instructed not to present them. By July, the Respondent was delaying its responses to the Union's proposals, particularly the September 5 proposal which represented a significant movement toward the Respondent's position.

Furthermore, the Respondent's conduct away from the bargaining table evidenced bad faith. The Respondent's attempts to bypass the Union and deal directly with the employees, its unilateral changes in terms and conditions of employment, and failure to provide relevant information, as well as its conduct in violation of Section 8(a)(1), further manifested the objective of frustrating and preventing an agreement from being reached.

Moreover, there is a nexus between the unlawful acts and the Respondent's conduct during negotiations sufficient to reflect the Respondent's intent not to bargain in good faith. See *Litton Systems,* 300 NLRB 324, 330 (1990), enfd. 949 F.2d 249 (8th Cir. 1991). The Respondent's bad faith was clearly evidenced in its attempt to unlawfully bypass the Union and deal directly with the employees. The Respondent had no prior history of soliciting employee grievances. Bad faith was also evidenced through the Respondent's unilateral changes in wages and insurance benefits. These actions seek to communicate to employees that there is no need for the Union as their collective-bargaining representative. See *May Department Stores Co. v NLRB,* 326 U.S. 376, 384–385 (1945).

In addition, the 8(a)(1) statements of one of the Respondent's supervisors provide a roadmap to the Respondent's bargaining strategy. Thus, in October 1995, Supervisor Bill Lincks, in response to employee Chris Poole's statement of approval over the Respondent's perceived willingness to negotiate at the onset of bargaining, replied that "the Union would be there one year." In April 1996, Gary Lincks told employee Paul Cook that "within a year the whole thing would be over with and they'd probably have a new vote." Bill Lincks also told employee J.R. Cook that he was going to "appoint [him] supervisor, that way [he] won't be able to vote next time." When questioned as to when the next vote would take place, Bill Lincks replied: "the same time it did last year," with implied reference to the conclusion of the certification year. Also in April 1996, Gary Lincks told employee Wesley Smith that "it would be to the Company's benefit not to enter into a contract with the Union, the main reason being it would cost them money and that they would and could wait until all the Union's supporters were gone then they'd have everything their own way." Wesley Smith was also told that "it wouldn't do us any good to negotiate with the Company because they'll just wait . . . till the next election." On September 5, 1996, Bill Lincks asked employee Poole whether he was needed at what would prove to be the final bargaining session. When Poole responded that he was needed, Links replied that "he didn't know why they needed both of you (i.e., Poole and Paul Cook) all here. You are going to accomplish the same thing you've always accomplished which is absolutely zero." These statements clearly indicate that the Respondent intended to drag out the negotiations until a year had passed and then request a new vote to rid itself of the Union. The statements also inform the employees that bargaining is futile and that they would be better off without the Union because, as Bill Lincks told Poole, "if they hadn't joined [they would] have done had done had $10 an hour and done had new trucks."

Thus, the Respondent's conduct both at and away from the bargaining table clearly demonstrates that it intended to frustrate negotiations, and prevent the successful negotiation of a bargaining agreement. Accordingly, we find

that the Respondent violated Section 8(a)(5) of the Act by engaging in surface bargaining.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Hardesty Company, Inc., Van Buren and Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that bargaining with the Union would be futile.

(b) Informing employees that they will not be assigned work with Winslow facility employees because of their union activities.

(c) Informing employees that had they not selected the Union as their collective-bargaining representative they would have received a raise and new trucks.

(d) Informing employees that negotiating with the Union would accomplish zero.

(e) Telling employees that it would not enter a collective-bargaining agreement and that there would be a new vote within a year.

(f) Making obscene and derogatory remarks about employees' union caps.

(g) Refusing to bargain in good faith with the Union as the certified collective-bargaining representative of the employees in the appropriate collective bargaining described below.

(h) Engaging in surface bargaining.

(i) Bypassing the Union and dealing directly with employees.

(j) Unilaterally changing pay rates and health insurance benefits.

(k) Refusing to provide the Union with requested relevant information.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) On request of the Union, revoke the unlawfully implemented wage increase.

(b) On request of the Union, revoke the unlawfully implemented health insurance plan and return to the status quo and/or any other insurance plan agreed to by the Union, and make employees whole for any losses sustained from this unlawful unilateral change.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) On request, bargain collectively with the Union as the exclusive representative of all employees in the unit with respect to pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All drivers, batchmen, mechanics and front-end loader drivers employed by the employer at its Van Buren and Fort Smith, Arkansas, facilities. Excluded from the unit are all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(e) Within 14 days after service by the Region, post at its facilities in Winslow, Van Buren, and Fort Smith, Arkansas, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on the form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] As set forth in his concurrence, Chairman Hurtgen would also authorize the Regional Director to appoint, at the Union's request, a mediator. The mediator would be directed, at the Respondent's expense, to participate in all bargaining sessions and to attempt to forge an agreement or, failing an agreement, to report to the parties and the Regional Director on the status of negotiations and the mediator's recommendations. We find the Chairman's proposal of interest. However, as the General Counsel has not sought this novel remedy and the parties have not had an opportunity to brief the issue, we will not address it at this time.

[7] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN HURTGEN, concurring in part.

1. I agree with my colleagues that the Respondent has engaged in bad-faith bargaining in violation of Section 8(a)(5) and has committed other violations of Section 8(a)(1) and (5).

Unlike my colleagues, however, in finding that the Respondent did not bargain in good faith, I rely principally on statements by Respondent's agents. In these statements, the Respondent vowed to end the bargaining relationship after the certification year had expired, threatened to insure a union loss in a new election by appointing prounion bargaining unit employees to supervisory positions, told employees that they would have higher wages and new trucks if they reject union representation, and predicted that the Union would accomplish "absolutely zero" in negotiations. In my view these statements are sufficiently tied to the Respondent's position in bargaining as to reflect the Respondent's intent to avoid reaching an agreement. See *Litton Systems*, 300 NLRB 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991).

I would not, however, rely on the fact that the Respondent made initial proposals which, if accepted, would have resulted in the employees receiving lower pay and fewer benefits than they had received before the advent of the Union. Under Section 8(d), neither party is required to make concessions. A union can ask for more than the status quo, and the employer can offer less.

2. As noted above, I concur in the finding of bad-faith bargaining. Further, as explained in my concurrence in *Altofer Machinery Co.*, 332 NLRB 130 (2000), as a remedy for the bad-faith bargaining violation found, I would authorize the Regional Director to appoint a mediator—chosen from a list of those qualified from an American Arbitration Association panel for the Regional Office area. The mediator would be directed, at the Respondent's expense, to participate in all bargaining sessions, to attempt to reach agreement. If, after a time decided by the mediator, these efforts fail, I would direct the mediator to render a report to the parties and to the Regional Director as to the status of negotiations and his or her recommendations concerning the resolution of the nonagreed-upon matters.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that bargaining with the Union would be futile and that there would be another vote in a year.

WE WILL NOT tell you that you will not be assigned work with our Winslow facility because of your activities on behalf of the Union.

WE WILL NOT tell you that had you not selected the Union as your collective-bargaining representative you would have received a raise and new trucks.

WE WILL NOT make derogatory or profane statements about your union caps.

WE WILL NOT tell you that you will make supervisors so that you would not be able to vote in the next election.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by soliciting your complaints and grievances.

WE WILL NOT refuse to bargain in good faith with the Union as the certified collective-bargaining representative of the employees in the certified unit by making unilateral changes in wage rates and health insurance benefits and by refusing to provide the Union with requested information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, revoke the unlawfully implemented wage increase.

WE WILL, on request, revoke the unlawfully implemented health insurance plan and either restore the previous plan or establish a new plan negotiated with the Union.

WE WILL, on request, bargain with the Union as the exclusive representative of all employees in the bargaining unit with respect wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

HARDESTY COMPANY, INC., D/B/A
MID-CONTINENT CONCRETE

Bruce Buchannan, Esq., for the General Counsel.
Stephen L. Andrew, Esq. (Stephen L. Andrew & Associates), of Tulsa, Oklahoma, for the Respondent.

DECISION

STATEMENT OF THE CASE AND BACKGROUND

D. RANDALL FRYE, Administrative Law Judge. This case was tried before me on March 19 and 20, 1997. The initial underlying complaint and notice of hearing issued on September 16, 1996. Thereafter, additional charges were filed by the Teamsters Local Union 373, AFL–CIO (Local 373 or Union). On November 21, 1996, a consolidated complaint and notice of hearing and order consolidating cases issued. The complaint was thereafter amended on January 30 and March 19, 1997. The complaint alleges that Hardesty Company, Inc., d/b/a Mid-Continent Concrete (Hardesty Company, Inc. or Respondent) violated Section 8(a)(5) of the Act by unilaterally changing the insurance benefits of its employees, by refusing to furnish requested information and by failing to bargain in good faith with the Union. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by informing its employees of the futility of union representation, soliciting employees to directly meet with management, informing its employees that they would earn more money without union representation, making profane statements concerning the employees union caps, and informing employees that their travel would be restricted because of their union activities.

Background and Procedure Matters

During the course of the trial, the parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. After close of hearing, briefs were timely filed by counsel for the Respondent and counsel for the General Counsel. Also, after close of trial, the parties, pursuant to an agreement made at trial, filed additional documents which revealed the wage rates of certain employees of Respondent. I have received this stipulation, with attachments 1–4, as Joint Exhibit 2.

In addition to the above, the General Counsel filed two additional posttrial documents. On April 9, 1997, a motion to reopen the record was filed seeking admission into evidence of a March 24, 1997 letter from Respondent's attorney, Stephen L. Andrew, to Randall Sanderson, the Union's representative. Succinctly, the letter withdrew from bargaining prior proposals made by Respondent. The General Counsel argues that this conduct is further evidence of bad-faith bargaining by Respondent. In opposing this motion, Respondent contends, inter alia, that it would be deprived of procedural due process should the letter be admitted without relevant testimony to fully explicate its purpose and intent. In my view, Respondent's argument must prevail. The March 24, 1997 letter was offered to show unlawful bad-faith bargaining. Under the circumstances here present, testimonial evidence may well be critical to a correct determination as to whether this conduct is, in fact, evidence of unlawful bad-faith bargaining. Accordingly, the General Counsel's motion to reopen the record is denied.[1]

On April 29, 1997, the General Counsel filed a motion to strike portions of Respondent's brief. In its best light, the General Counsel's motion may fairly be considered a reply brief, a document not permitted under the circumstances here present. Accordingly, this motion to strike is also denied.

FINDINGS OF FACT

I. JURISDICTION

Hardesty Company, Inc. d/b/a Mid-Continent is engaged in the business of providing ready-mix concrete through its 27 facilities located in Oklahoma and Arkansas and annually purchases and receives goods valued in excess of $50,000 from points outside Oklahoma.

Teamsters Local Union 373 affiliated with International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent operates 27 facilities in Oklahoma and Arkansas. On August 21, 1995, Local 373 was certified as the collective-bargaining representative for Respondent's drivers, batchmen, mechanics, and front–end loader drivers employed at its Van Buren and Fort Smith, Arkansas facilities. Negotiations for a collective-bargaining agreement commenced on October 13, 1995. Randall Sanderson, secretary–treasurer and principle officer of Local 373, represented the Union in negotiations. Respondent was represented by Attorney Stephen Andrews. At the time of hearing, the parties had not reached agreement on terms for a collective-bargaining agreement.

III. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by informing employees of the futility of union representation, soliciting employees to meet directly with management, informing employees they would earn more money without union representation, making profane statements concerning employees' union hats, and informing employees of restrictions on their travel due to their union activities. The complaint further alleges that Respondent violated Section 8(a)(5) of the Act by refusing to furnish requested information to the Union, by unilaterally changing health insurance benefits and wage rates for unit employees, and by failing to bargain in good faith with the Union.

A. The Bargaining

In 1995, the Union engaged in an organizational campaign of Respondent's employees at its Fort Smith and Van Buren facilities. Although Respondent opposed unionization, these employees[2] voted on August 11, 1995, in favor of representation by the Union, and was certified by the Regional Director on August 21, 1995.

On October 13, 1995, the Union and Respondent met and began negotiations for a collective-bargaining agreement. The Union was represented by its principal operating officer,[3] Randall Sanderson; Respondent was represented by Kevin Ikenberry, one of its attorneys. At this session, the Union presented

[1] In view of my overall disposition of this case, I did not consider a supplemental hearing necessary to provide either Respondent or the General Counsel an opportunity to further litigate this issue.

[2] The unit certified included drivers, batchmen, mechanics, and front-end loader drivers.

[3] Employees Christopher Poole and Paul Cook also attended this session on behalf of the Union.

and explained its contract proposals to Respondent's representative. The Union proposed an hourly wage rate of $11.75 for drivers with a 50-cent-an-hour raise during the second year of the contract. At the time, Respondent's starting wage scale for truckdrivers was $7.50 per hour. After 3 months, drivers earned $8 hourly and after 6 months $8.50 hourly. After a year, drivers received the top pay of $9 hourly. At the time, Mechanics earned $10.75 hourly while front-end loaders drivers earned $9 hourly. Employees were paid overtime after working 40 hours per week and received a paid 1-week vacation after 1 year of employment and a paid 2-week vacation after 2 years of employment. Finally, employees received seven paid holidays during the year and were covered by Respondent's company wide health insurance plan for which they made monthly contributions. The Union also proposed that Respondent improve health insurance benefits, provide additional vacation time, and two additional paid holidays, continue its present contributions to the 401(k) Pension Plan and further, provide weekly contributions to the Teamsters Central States Pension Fund. The Union's proposal also included a wide range of contract provisions such as a recognition clause, checkoff, seniority, hours of work, leave of absence, a grievance procedure, work assignments, defective equipment, just cause provision for discharge/suspension, management-rights and a no–strike or lockout clause. Ikenberry did not present any contract proposals and his participation at this session was limited to listening to the Union's presentation. According to the unrebutted testimony of Sanderson, Ikenberry stated that he had no authority to negotiate and was there only to receive the Union's proposals.

The second bargaining session was held on November 29, 1995. At this session, Steven Andrew, Respondent's primary attorney, presented contract proposals which covered subjects such as recognition, management rights, equal employment opportunity, protection of rights, no strikes, no lockouts, a grievance procedure, health insurance, seniority, hours of work, vacations, and holidays. No wage proposals were made. However, during the course of this negotiating session, the parties tentatively agreed to the following articles. Article 1, recognition; article 3, equal employment opportunity; article 4, no strike, no lockout; article 5, protection of rights; article 7, validity; article 9, grievance procedure; article 10, shop steward; article 14, jury duty; and article 15, funeral leave (Jt. Exhs. 1 and 8).

The third negotiation session was held on December 28, 1995. During this meeting the parties agreed to article 31, individual agreement, article 32, amendments, additions, waivers and article 34, termination. In addition, the parties reached agreement on some of the language in several other proposed articles.

The parties next met on February 5, 1996. Agreement was reached on unnumbered articles covering seniority, uniforms, and physical and mental examinations. Language on parts of several other articles was discussed and agreed upon. At the next negotiating session held on February 12, 1996, the parties reached agreement on a seniority clause, the grievance procedure, and parts of other articles. At this meeting, Respondent offered a new proposal regarding vacations. Previously, it had proposed a 1-week vacation after 1 year of employment and a 2-week vacation after 2 years, which was essentially its existing vacation policy. In contrast, its new proposal provided for a 1-week vacation after 1 year of employment and a 2-week vacation after 3 years, provided that employees work a minimum of 1540 hours during the year or the equivalent of 38-1/2, 40-hour weeks.

On March 29, 1996, the parties again met to negotiate. For the first time, Respondent submitted a wage proposal to the Union. (R. Exh. 15.) The proposed hourly wage rate equaled the hourly rates then paid by Respondent to unit employees. Respondent also proposed the elimination of paid overtime, a significant employee benefit. According to the testimony of employee Chris Poole, overtime (time beyond 40 hours weekly) was offered to employees regularly, and averaged 10 hours weekly over the course of a year. Based on his wage rate of $9 an hour, Poole's overtime pay averaged $135 weekly. Also, during this session, Respondent proposed to pay $115 monthly as a maximum employer contribution to group health insurance and further proposed to eliminate the current 401(k) plan as well as the bonus load plan. At the next meeting, held on April 10, 1996, Andrew advised the Union that he had prepared further proposals but his client had, just prior to the meeting, instructed him not to present any proposals. Nonetheless, the parties continued with this meeting, discussing various pending proposals.

On May 1, 1996, the parties met and negotiated with the assistance of a mediator from the Federal Mediation and Conciliation Service. The Respondent presented proposals that Andrew described as its best and final offer. Essentially, this proposal was a close facsimile of Respondent's March 29, 1996 proposal, although it did include the Union's dues-checkoff proposal. During this session, Sanderson inquired of Andrew if he was aware that Respondent had increased hourly wages for employees at many of its other facilities. Andrew replied that he was not aware of any increases. Although the parties discussed several bargaining subjects, they were unable to reach further agreement.

The parties met again on May 28 and June 11, 1996. Various proposals were discussed and agreement reached on a progressive discipline provision. Respondent offered movement on its vacation proposal by reducing from 3 to 2 years, the duration of employment required for a 2-week vacation. Toward the end of the session, Sanderson proposed orally the establishment of $10.90 as the top hourly wage, overtime after 40 hours, a 401(k) plan, and a bonus plan, and resolve the problem with health insurance. Andrew advised that he would have to "get with Hardesty on it." (Tr. 93–95.)

On July 11 and August 1, 1996, the parties met again. Subjects discussed included truck assignment, subcontracting, hours of work, vacation holidays, pension, health insurance, defective equipment, work assignments, union access, workers' compensation, safety issues, a dispatch procedure, and wages. However, no agreement was reached on any subject during these two bargaining sessions.

On August 28, 1996, Respondent sent the Union an overall contract proposal that varied little from earlier proposals. However, in this proposal, adjacent to the proposed contract language for group insurance, appeared the notation "TA

6/11/96," indicating the parties' tentative agreement on this subject. Sanderson testified at trial that while he had received and reviewed this document prior to the September 5, 1996 bargaining session, he failed to discover the above notation until preparing for the litigation of this case. He further testified that at no time did he agree to the group insurance proposal as proposed by Respondent.

As planned, the parties met on September 5, at which time the Union submitted a comprehensive counterproposal. While the parties briefly discussed this proposal, Andrew indicated that he would have to respond to these proposals at a later date. The Union's proposal submitted at this meeting represented significant movement toward Respondent's position. While the parties corresponded regarding certain proposals between September 5, 1991, and February 4, 1997, no agreement was reached.

B. Conduct Away from the Bargaining Table

During the course of bargaining, Respondent engaged in certain conduct, which provides insight into its motive and intent with respect to entering a collective-bargaining agreement with the Union. As above noted, the parties commenced face-to-face bargaining on October 13, 1995. Also in October, Respondent began on a course of conduct intended to undermine the collective-bargaining process. In this regard, Christopher Poole[4] an employee driver at Respondent's Van Buren facility, testified that he had a conversation with Bill Lincks[5] in which he informed Lincks that,"I was real impressed with Robertson [Respondent's President] for accepting the fact that we had voted the Union in and we was going to go ahead and work, you know, work through it and get a contract and live with what we had." Lincks reply to Poole was, "The Union would be there one year." (Tr. 250–251.) In May or June 1996, Poole had another conversation with Lincks. This conversation occurred in the breakroom at the Van Buren dispatch office. Poole had been discussing the heavy workload with another unidentified driver who advised him that the Winslow drivers would no longer help the Van Buren drivers. Previously, Respondent's practice had been to assign employees at the Winslow and Van Buren facilities on an interchangeable basis, depending on the workload at each location. After finishing his conversation with the unidentified employee, Poole went to Lincks and inquired as to why there had been a work location change. Poole testified that Lincks informed him that it was "because we were—some of them was up there trying to recruit the—trying to recruit the Winslow drivers into the Union." (Tr. 251–252).

In the summer of 1996, Lincks and Poole were engaged in a general conversation at the Van Buren facility. Poole testified that during this discussion Lincks informed him that he felt betrayed by the drivers for joining the Union and advised that, "if we hadn't joined we [would] have done had $10 an hour and done had new trucks." On or about September 5, 1996, Poole had another conversation with Lincks at the Van Buren facility. According to Poole, he had just returned from a morning delivery when Lincks approached him and asked, "Do . . . they need both of [you] at the bargaining meeting." This question was in reference to whether both Poole and Cook were needed by the Union at a negotiating session scheduled for that morning. Poole telephoned Sanderson who advised that both were needed for the session. When Poole conveyed this information to Lincks, the latter replied, "I don't understand why they need both of you all there . . . you're going to accomplish the same thing you've always accomplished, which is absolutely zero."

Three additional employees gave testimony at the trial with respect to conversations they had with Gary Lincks or Bill Lincks. First to testify was J. R. Cook, a mechanic employed by Respondent at its Fort Smith facility from May 1995 to January 1997. Cook was a supporter of the Union and regularly wore a Teamsters cap to work. He testified that toward the end of April 1996, the shop supervisor left the employment of Respondent. Shortly after his departure, Bill Lincks informed Cook that he was going to make him the supervisor. Cook replied that he did not want the job. In response, Bill Lincks stated, "I'm going to appoint you supervisor, that way you won't be able to vote next time." (Tr. 246–247.) In reply to Cook's inquiring as to when the vote would take place, Bill Lincks stated "the same time it did last year." (Tr. 247.)

The next employee to testify was Paul Cook, the brother of J. R. Cook, who also openly supported the Union. Paul Cook testified that in April 1996 he had a conversation about negotiations with Gary Lincks at the Van Buren facility during which Lincks advised that, "within a year the whole thing would be over with and they'd probably have a new vote." On May 2, 1996, Cook was at the Van Buren facility engaged in general conversation with both Bill and Gary Lincks. On this day, Cook and other union supporters wore Teamsters caps to work. In response to this attire, Cook testified that, "all of a sudden Bill turned around and looked at Gary and said I see all the boys have got their cocksucker hats on. And Gary turned back towards Bill and said, yeah, he said all the boys has got their cocksucker hats on." Later in May 1996, Cook testified about another conversation with Bill Lincks at the Fort Smith facility during which Lincks asked Cook to "go poll the boys and see what their opinion was on setting up a meeting with Jim Robertson." A few days later Lincks asked Cook what he had found out "from polling the boys." In response, Cook informed him that there was no interest in such a meeting. (Tr. 280–284.)

Employee driver Wesley Smith testified about a conversation he had with Gary Lincks concerning contract negotiations. This conversation took place in April 1996, in the front office of the Van Buren plant. According to Smith, Lincks informed him that "it would be to the Company's benefit not to enter a contract with the Union. The main reason was that it would cost them money and that they would and could wait until all the union supporters were gone then they'd have everything their own way. He said they were going to look out for business first." "He said it wouldn't do us any good to negotiate with the Company because they'll just, you know, wait till another election." Respondent called no witnesses to rebut any of the above testimony.

[4] Poole also served the Union as alternate steward and was a member of the Union's bargaining committee.

[5] Both Bill and Gary Links are admitted supervisors within the meaning of the Act.

IV. DISCUSSION

Section 7 of the Act (29 U.S.C. 157) guarantees employees "the right to self organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." Section 8(a)(1) of the Act enforces this guarantee by making it an unfair labor practice for an employer to, "interfere with restrain and coerce employees in the exercise of the rights guaranteed in Section 7." The body of law developed by the Board and Courts under this Section of the Act is substantial. Thus, it is well settled that an employer violates Section 8(a)(1) of the Act by threatening employees with job losses by conveying to employees the futility of self-organization and collective bargaining. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 690–691 (7th Cir. 1982); *Outboard Marine Corp*., 307 NLRB 1333, 1335 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993), *Forrest City Grocery Co*., 306 NLRB 723, 729 (1992). Similarly, statements that employees would be removed from the unit by promotion or otherwise so that they would not be able to vote in a union election have been found to violate Section 8(a)(1) of the Act. *Amperage Electric*, 301 NLRB 5, 14–16 (1991), enfd. mem. 956 F.2d 269 (6th Cir. 1992). Violative also are statements that employees would not receive a raise because of their union activities, that employees access to other employees would be restricted by the employer to limit their organizational activities, and profane statement concerning employees union activities. *Marshall Darbin Poultry Co*., 310 NLRB 68 (1993), *Miller Group*, 310 NLRB 1235, 1238 (1993), enfd. mem. 30 F.3d 1487 (7th Cir. 1994); and *Bonanza Sirloin Pit*, 275 NLRB 310, 311 (1985). Finally, solicitation of employees' grievances have also been found by the Board to violate Section 8(a)(1) of the Act. The test, according to the Board and Courts, for determining whether an employer has violated Section 8(a)(1) of the Act is whether the employers conduct reasonably tends to be coercive, not whether employees were in fact coerced. *NLRB v. Berger Transfer & Storage*, 678 F.2d at 689; *Jays Food, Inc. v. NLRB*, 573 F.2d 438, 444 (7th Cir.), cert. denied 439 U.S. 859 (1978).

The alleged unlawful 8(a)(1) conduct in this case was presented by the General Counsel through several witnesses as discussed above. I fully credit the testimony of each of these witnesses based on their demeanor. Moreover, their testimony was not rebutted as Respondent failed to call any witnesses to testify with respect to any of the alleged 8(a)(1) conduct. Accordingly, I find that each of the alleged 8(a)(1) allegations are fully supported by credible testimony and are violative of the Act.

Section 7 of the Act also provides that employees have the right "to bargain collectively through representatives of their own choosing." Section 9(a) of the Act provides that representatives selected by the majority of an appropriate unit shall be the exclusive representative of employees in the unit for the purpose of collective bargaining with respect to "rates of pay, wages, hours of employment, or other conditions of employment." Section 8(a)(5) of the Act makes it unlawful for an employer "to refuse to bargain collectively with the representative of his employees." Section 8(d) of the Act defines the duty to bargain collectively, as the mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, and other terms and conditions of employment, or the negotiation of an agreement." Thus, the statutory mandate "contemplates a willingness to enter into discussions with an open mind and a sincere intent to reach an agreement consistent with the respective rights of the parties." *Sign & Pictorial Local 1175 v. NLRB,* 419 F.2d 726, 731 (D.C. Cir. 1969). However, Section 8(d) also provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Moreover, the Board may not "compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952). "[A]dament insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith," for "[i]f the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever." *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990).

The law is well settled that an employer's duty to bargain in good faith pursuant to Section 8(a)(5) and (1) includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152–153 (1956).

An employer's obligation to provide the union with relevant information is founded in the acknowledgement that "good faith bargaining requires full disclosure by the parties of relevant information in order to produce informed, effective negotiations." *General Electric Co. v. NLRB*, 466 F.2d 1177, 1183 (6th Cir. 1972).

As above noted, an employer is obligated to produce all requested relevant information. Information is relevant if it has any bearing on the matters being discussed. In *NLRB v Acme Industrial Co*., 385 U.S. 432, 437 fn. 6 (1967), the Court stated, "[t]he standard of relevancy is a liberal, discovery-type standard."

As set forth above, Section 8(d) of the Act further provides the parameters within which the parties must discharge their respective collective-bargaining responsibilities. Notice and an opportunity to bargain about any proposed change is essential to that process. Thus, employer changes in wages or other terms of employment without providing the union an opportunity to bargain "minimizes the influence of organized bargaining" and emphasize to employees "that there is no necessity for a collective bargaining agent." *May Department Stores Co. v. NLRB*, 326 U.S. 376, 384–385 (1945). Any unilateral action regarding mandatory subjects of bargaining is prohibited, "for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). More to the point, the Court in *Katz* also held that an employer cannot unilaterally change existing employment terms and conditions during ongoing collective-bargaining negotiations.

V. THE UNILATERAL CHANGES

In it's various locations, Respondent employs approximately 1000 employees. At the time the Union was certified as a collective-bargaining representative and bargaining commenced

all employees were covered by the same group health insurance plan. (Tr. 316–317.) On June 1, 1996, Respondent changed its insurance carrier as well as some of the terms of the coverage. For example, under the new plan employees would have to pay annual deductibles of $300 for individual coverage and $900 for family coverage. Under the previous plan, there were no deductibles. Employee out of pocket expenses were also higher because employees paid higher yearly minimums, higher prescription costs, and higher costs for certain health care services. (Jt. Exhs. 1 and 22–23.)

Respondent contends that its conduct in changing the plan did not violate the Act for two reasons. First, it contends that, while the insurance benefit plan changed, the status quo benefit of a right by the unit employees to participate in the group insurance plan did not change. Secondly, it contends that the Union agreed to participation in the companywide plan. Respondent argues that this agreement is revealed in Joint Exhibit 25 at page 15. On this page, Respondents proposed contract language for insurance coverage appears as follows in this contract proposal, "all insurance benefits to which other company employees are entitled on the same terms as made available to other employees." In the left hand column of this document, adjacent to the proposed language, appears the following: "OK. 6–11–96." Respondent argues that this notation, which it made, indicates agreement by the parties on this proposed language. In further support of this argument, Respondent contends that the Union did not object to this notation when it received Respondent's proposals prior to the September 5, 1996 bargaining session, and did not raise any concern during this bargaining session or at any time prior to the litigation of this case. This silence, Respondent contends, supports its view that the parties agreed to the group insurance proposal. However, Respondent's argument is fatally flawed as it presented no witnesses to testify to establish facts on which such an argument would be made. On the other hand, the General Counsel presented facts on this subject through witness Sanderson who credibly testified that while insurance language had been discussed the Union had not, at any time, agreed to the proposed language embodied in Joint Exhibit 25 at page 15. He further explained that he did not object to the notation, "OK. 6–11–96," earlier because he did not discover it until preparing for the litigation of this case. This testimony is fully credited as it is unrebutted by testimonial evidence from Respondent.

Respondent's argument that there was no unilateral change in the status quo right by the unit employees to participate in the group insurance plan did not change is fatally flowed. Should Respondent's argument prevail, all benefit plans, such as wage plans, bonus plans, and vacation plans, in which unit and nonunit employees participate on a companywide basis, would be subject to unilateral action by an employer. Such a result would be in direct contravention of the mandates of Section 8(a)(5) of the Act.

For the above reason, I conclude that Respondent engaged in unlawful unilateral action in implementing a new wage rate and new insurance plan. Accordingly, Respondent violated Section 8(a)(5) of the Act.

With respect to truck assignment, the General Counsel called two witnesses, Wesley Seth and Christopher Poole, both of whom testified, based on their experience, that truck assignment had generally been made on the basis of seniority although there was no written company policy. On cross-examination, Wesley Seth conceded that other factors, such as driving record and demonstrated ability to properly care for the trucks, were also considered by Respondent in assigning new trucks to employees. (Tr. 15.) Respondent's president, Jim Robertson, testified that there was no written policy with respect to the assignment of new equipment to employees. He further explained that Respondent's practice had been to consider the driver's productivity, driving record, and seniority. He further stated that seniority was never the only factor considered in such assignment. I fully credit Robertson's testimony in this regard and particularly note that his explanation of Respondent's truck assignment policy was not inconsistent with the testimony of the two witnesses presented by the General Counsel. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

VI. THE REQUEST FOR INFORMATION

Applicant and union member Jerry Hixson applied for a driver's position at Respondent during the summer of 1996. As he was not hired, the Union, by letter to Respondent's attorney dated August 28, 1996, requested to "review the so-called large list of applicants." In the letter, the Union further requested that Respondent's attorney call to set a date for the Union to review the applications (Jt. Exhs. 1 and 24.) Respondent failed to reply to this request and now argues that it was not obligated to provide the requested information as Hixson was not hired and therefore not a member of the bargaining unit.

On May 2, 1996, Respondent hired Mark Bell as a mechanic at its Fort Smith facility. Sometime after September 10, 1996, Bell was promoted to lead mechanic, a position outside the bargaining unit. (Tr. 298, 306.) On September 16, 1996, the Union faxed to Respondent's attorney a request for the pay rate of mechanic Mark Bell. (GC Exh. 6.) The confirmation report indicates that the request was sent to Anderson's fax number on September 16, at 17:04 hours. At trial, as a statement of counsel and on brief, Andrew, on behalf of Respondent, contends the request not received.

I find that the requested information in both instances was necessary and relevant for the Union to discharge its statutory responsibility. The request with respect to applicant and union member Hixson was made to enable the Union to assess whether Respondent's refusal to hire him was discriminatory. Such a request is fully consistent with the Act as interpreted by the Board and Courts. *Hertz Corp.*, 319 NLRB 597, 599–600 (1995). Accordingly, I find Respondent's refusal to provide this information violative of Section 8(a)(5) of the Act.

Information with respect to the wage rate of employees similarly situated is also relevant and necessary. Initially, Respondent argued that the General Counsel failed to establish that the request was received. However, the Board in *Clow Water Systems,* 317 NLRB 126 (1995), held that, under circumstances strikingly similar to those here present, "the responsibility for maintaining adequate office procedures concerning fax transmission, and knowledge of the receipt of the Unions communications during regular office hours may reasonably be imputed

to it." Respondent argues that since the Sixth Circuit Court of Appeals disagreed with the Board's Rule and denied enforcement this allegation should be dismissed. However, under the present regulatory scheme, I do not have discretion to disregard Board law. Accordingly, I conclude that the evidence in this case is sufficient to impute knowledge of receipt of the faxed request for information. Respondent further argues that, assuming receipt of the request, it was not obligated to provide the information since the subject employee, Bell, was not in the unit. However, the information sought was intended to encompass the wage rate of Bell when he began employment as a mechanic in the unit. Thus, Respondent was obligated to provide the information, *Days Hotel of Southfield*, 306 NLRB 949, 953–954 (1992). Accordingly, its refusal to do so is violative of Section 8(a)(5) of the Act.

Finally, the General Counsel argues that when the above events are examined in context along with the ongoing negotiations the resulting totality of conduct by Respondent reveals an overall course of bad-faith bargaining. It is further argued that proposals made by Respondent at the bargaining table on overtime pay, health insurance, wages, management rights, union access, defective equipment, 401(k) plan, and bonus pay evidence bad faith as they were inherently regressive. Respondent, on the other hand, argues that it has lawfully discharged its bargaining obligation by meeting frequently, fully explaining its proposals, making concessions, and reaching agreement on numerous subjects. It further argues that none of its bargaining proposals could be objectively viewed as unreasonable or unlawful.

Based on the totality of circumstances in this case, I conclude that Respondent engaged in an unlawful course of conduct specifically designed to avoid entering a collective-bargaining agreement with the Union. Respondent's conduct, both at and away from the bargaining table, fully supports this conclusion. As to the latter, the unlawful 8(a)(1) conduct in which Respondent's supervisors engaged provides insight into its motivation at the bargaining table. Similarly, the above noted unilateral action by Respondent served to undermine the Union's status as collective-bargaining agent with the obvious objective of causing disaffection of its membership. Further evidence of bad faith by Respondent is present in the above referenced bargaining proposals, which I conclude were inherently regressive. For example, prior to the advent of the Union, many of Respondent's drivers were paid $9 hourly for 40 hours a week plus a weekly average of 10 hours of overtime at one and one–half times the hourly rate. Thus, the average weekly pay for drivers was $495. Respondent proposed throughout bargaining to eliminate all overtime which would result in a 27-percent pay cut for most drivers. With respect to vacation, Respondent proposed to maintain the same time period but to require that employees work 1540 hours during the year to receive the benefit. Benefit reductions were also proposed in the form of reduced health insurance coverage as well increased contributions by employees toward the cost of health insurance. A review of Joint Exhibits 1 and 28 reveals increases for family coverage of $23 monthly; for employee and children, $17.25 monthly; for employee and spouse, $16.40; and for employee, $8.25. Respondent also proposed a broad subcontracting clause, which, if agreed to, would permit Respondent to subcontract unit work on an unlimited basis. Additionally, although providing a 401(k) plan for employees as well as an incentive program based on delivered cement, Respondent steadfastly refused to include these benefits in a collective-bargaining agreement. Significant also in assessing Respondent's motivation is its conduct in granting wage increases to nonunit employees while proposing to reduce unit employees' wages by approximately 27 percent.

While it may be fairly argued that Respondent's position on the above referenced bargaining proposals, when viewed separately, does not evidence bad faith, a different result clearly obtains when Respondent's conduct, both at and away from the bargaining table, is considered. Moreover, Respondent's unlawful motive becomes patently clear when the above bargaining proposals are considered along with the unlawful unilateral action, the refusal to provide information and the numerous violations of Section 8(a)(1) of the Act.

Thus, Respondent engaged in a course of conduct, both at and away from the bargaining table, designed to undermine the union's status as collective-bargaining agent and to avoid reaching agreement with the Union. Accordingly, Respondent's conduct is violative of Section 8(a)(1) and (5) of the Act. *Overnite Transportation Systems*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). *Chester County Hospital,* 320 NLRB 604 (1995).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union 373 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, Teamsters Local Union 373 has been the exclusive collective-bargaining representative of Respondent's employees in the following unit appropriate for the purposes of collective bargaining:

> All drivers, batchmen, mechanics and front–end loader drivers employed by the employer at its Van Buren and Fort Smith, Arkansas, facilities, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

4. Respondent, in April 1996, violated Section 8(a)(1) of the Act by informing employees that bargaining with the Union would be futile and Respondent would wait for another election.

5. In or about June 1996, Respondent violated Section 8(a)(1) of the Act by informing employees that they would not be assigned work with Winslow facility employees because of their activities on behalf of the Union.

6. Respondent, in or about the summer of 1996, violated Section 8(a)(1) of the Act by informing employees that had they not selected the Union as their collective-bargaining representative they would have received a raise and new trucks, by telling employees they would be appointed supervisors to prevent them from voting in another union election, by making obscene and derogatory remarks about employees' union caps, and by telling employees that it would not do the employees any good to negotiate with Respondent as it would wait for a new election.

7. Respondent, on September 5, 1996, violated Section 8(a)(1) of the Act by informing employees that negotiating with the Union would accomplish zero.

8. Respondent, on April 29 and May 2, 1996, violated Section 8(a)(5) of the Act by unilaterally changing pay rates; on June 1, 1996, by unilaterally changing health insurance coverage; and, May 1996, by bypassing the Union and dealing directly with employees.

9. Respondent, on August 28 and September 16, 1996, violated Section 8(a)(5) of the Act by refusing to provide the Union with requested information.

10. Respondent, since about October 13, 1995, and continuing to date, has refused to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Teamsters Local Union 373 by engaging in surface bargaining with the Union with no intention of reaching mutual agreement, in violation of Section 8(a)(5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unilaterally changed pay rates and insurance benefits I shall order it to rescind, at the Union's request, the unilaterally imposed wage increase and insurance benefit change. I shall also order Respondent to make employees whole for any loss they may have incurred including but not limited to, so from higher employee contributions to insurance premiums, reduced coverage, higher deductibles other changes.

As I have found that Respondent unlawfully refused to give the Union relevant information, which it had requested, I shall order that Respondent furnish the Union with the requested information.

As I have found that Respondent bypassed the Union and dealt directly with its employees, I shall order Respondent to cease from engaging in such conduct.

As I have found that Respondent refused to bargain in good faith with the Union concerning rates and pay, hours of employment, and other terms and conditions of employment and other terms and conditions of employment, I shall order it to cease engaging in such conduct.[6]

[Recommended Order omitted from publication.]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.